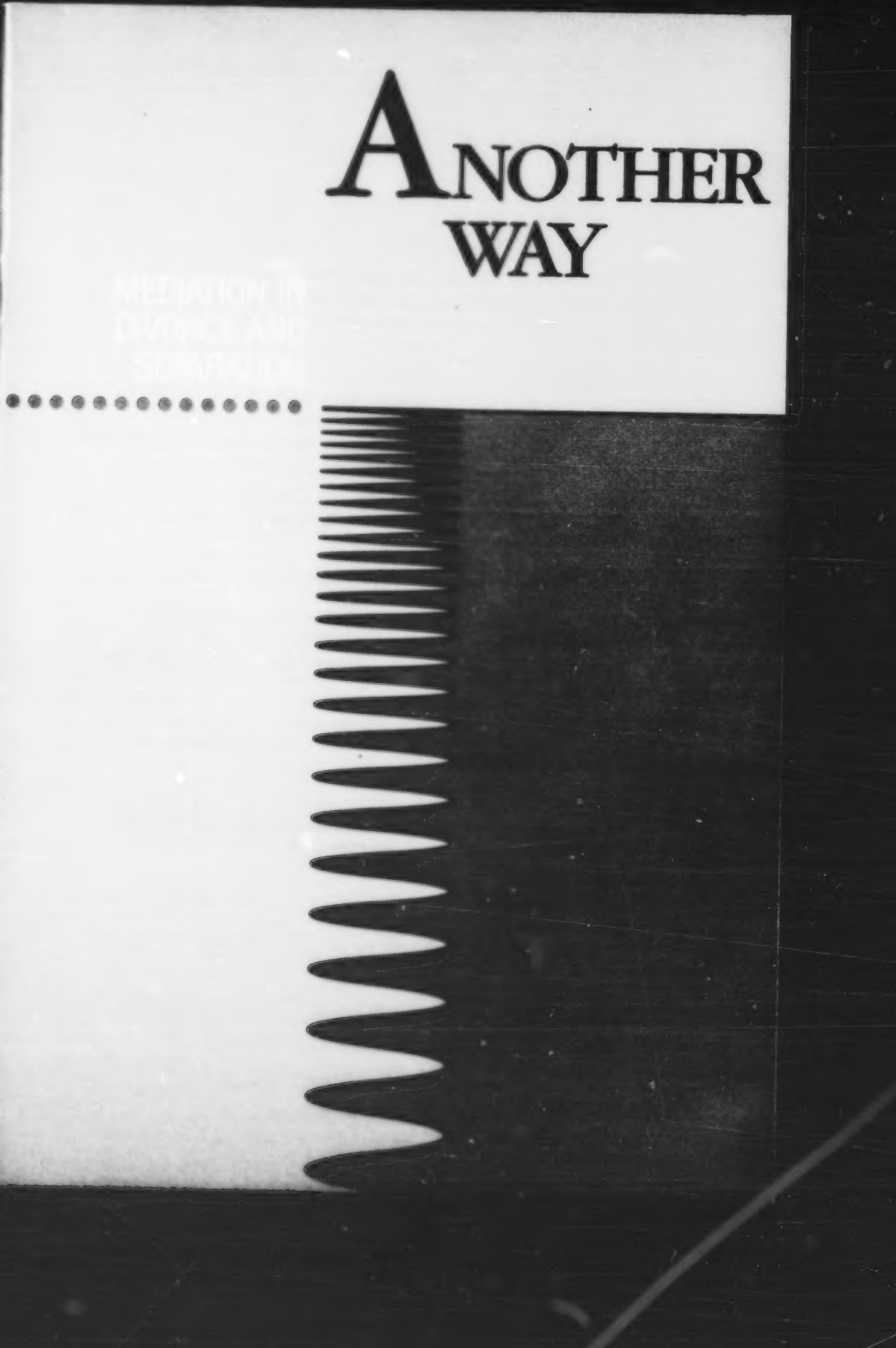
ANOTHER WAY

MEDIATION IN DIVORCE AND SEPARATION



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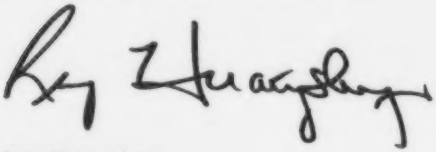
This publication provides information on mediation. It does not replace the need for legal advice.

Foreword

Canada's new divorce law, which came into effect on June 1, 1986, now makes it possible for a couple whose marriage has broken down to separate without the same degree of conflict that often accompanied legal proceedings under the old law. This less confrontational climate has led to increased interest in mediation. The Government of Canada seeks to inform Canadians about mediation in the belief that it can enable many couples to rearrange their lives in a greater spirit of co-operation and mutual respect, in a manner less disruptive to children and other family members, and in the better interest of society as a whole.



Ray Hnatyshyn
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Introduction

In 1986 Canada's divorce law was changed. The law now says that when clients ask lawyers about getting a divorce, their lawyers must tell them about the various ways a separating couple can negotiate to reach an agreement – that is, to come to terms on issues like support, child custody, and financial matters.

Lawyers are also required to tell clients about the *mediation* services with which they are familiar. Mediation is a new way of working out a settlement. In mediation, you and your spouse* work out a settlement together, with the help of a mediator, instead of having it worked out for you by your lawyers or by the court.

You may not have heard of mediation before. Until fairly recently, mediation services were not generally available throughout Canada. Now that such services are becoming more available, many more couples who are splitting up are going to mediators. While mediation is not for everyone, it can be a very effective and efficient way of reaching a settlement that is responsive to your needs, and to the needs of your spouse and children.

If your marriage has broken down and you have decided to separate, you and your spouse may want to think about seeing a mediator. This booklet gives you the basic information you need to understand mediation and to decide if mediation might work for you.

**In this booklet, the word "spouse" is used to mean a man or woman who is married. Mediation may also be helpful to couples who are living together without being married. However, the information in this booklet about going to court and getting a divorce does not apply to them.*

What is Mediation?

"When we finally decided to get divorced I thought that would be it. But it wasn't. After two people have been together for so long it's hard to start separate lives – money, debts, the furniture, the pots and pans. Really, where do you start? And how can you settle anything if all you can do is argue?"

When a marriage is over or when a couple separate, many questions need to be settled. Who will pay the bills? Who will stay in the family home? How will everything be divided? What about the bank accounts? Will one spouse continue to support the other after the marriage is over? If so, for how long?

If there are children, then there are questions about their care. With whom will they live? Who will make the day-to-day decisions about their lives? When can the other parent spend time with them? How much money will each parent pay to support them?

Mediation is a way for you and your spouse to settle these questions together. In mediation, you meet in face-to-face discussions with your spouse. With the assistance of a neutral mediator, you each state your point of view. The mediator then helps you to clarify the issues and negotiate to reach a mutually acceptable agreement.

MEDIATION IS NOT MARRIAGE COUNSELLING OR THERAPY

Counselling and therapy help you to find a way to make your marriage work again or to accept that it is over. Mediation, on the other hand, focuses more on achieving a practical separation agreement than it does on resolving emotional problems. While mediators must always be sensitive to their clients' feelings and to the possibility of reconciliation, the primary aim of mediation is not to bring you back together again, but to help you to negotiate a workable way of living apart.

Mediation is not the only way of settling the questions that arise when a couple separates. Traditionally, agreements have been worked out by lawyers. In this case, your lawyer and your spouse's lawyer negotiate on your behalf to try to arrive at an agreement that is acceptable to both of you. Most agreements are still reached this way.

If no settlement can be reached through negotiation, your divorce becomes a contested case. When this happens, your case goes to trial. After listening to both sides, a judge will decide on the terms of your divorce.

Mediation is different from these ways of reaching an agreement. In mediation you and your spouse work out the details of an agreement for yourselves.

MEDIATION IS NOT A WAY AROUND THE LAW OR THE LEGAL SYSTEM

Mediation is not a way around the law or the legal system. It is one of the alternatives within the legal system for reaching a separation agreement.

The federal divorce law and provincial and territorial laws set out principles that come into play whenever a husband and wife divorce. When you negotiate an agreement, you and your spouse must respect these laws.

The law says that only a court can decide if you can get a divorce. If you and your spouse have worked out an agreement – whether by yourselves, with a mediator, or through lawyers – the court must review your request for a divorce and your agreement before you can get a divorce. The court must be sure that your marriage has broken down and that there is no possibility of reconciliation. The court must also make sure that your agreement is consistent with the law, that it is fair and, if there are children, that it is in their best interests and contains reasonable arrangements to provide for them.

Mediation from Start to Finish

"That first meeting…boy, that was the toughest one. Looking back, I think we both came into it looking for a fight and trying to blame the other one for everything. But the mediator made it clear right from the beginning that he wasn't taking sides or interested in discussing why our marriage had ended. 'We're here to plan the future,' he said, 'not to fight about the past.' And he kept us to it."

Mediation usually takes from four to eight meetings. The meetings are often held on a weekly basis, but they can also take place at different intervals, sometimes going on for only a few weeks. Mediation is a flexible process. How long it takes and how many meetings are needed will vary according to your situation and the kind of mediation service that you are using.

For most couples, mediation usually follows a similar pattern.

The Beginning

The first time that you meet is a chance to get to know the mediator and learn more about mediation. To start out, many mediators like to tell clients about their approach to mediation,

how it will work, and how issues will be dealt with. If your mediator doesn't tell you these things, you may want to ask. This is also the time to establish basic rules for future meetings. The mediator may ask both of you to sign a contract that sets out some of these ground rules in writing.

At this point, if you do not already have your own lawyer, the mediator should recommend that you get one.

Defining Problems

Next, the mediator may help you and your spouse to define clearly the problems that you want to solve through mediation. What arrangements do you need to make? Have you decided who will remain in the family home? Who will pay the bills? Can you agree on how to divide property?

THE ROLE OF THE MEDIATOR

Mediators come from various professional areas – usually psychology, law, or social work. Whatever their professional background, mediators have one main role: to be an impartial facilitator who helps you and your spouse find concrete solutions to specific problems. The mediator helps you to identify options and to make choices among them. The mediator keeps the mediation process focused on the task at hand and moving forward towards solutions.

The mediator does not ...

- *assign blame or look for the cause of your breakup;*
- *give detailed legal advice in mediation, even if he or she is a lawyer;*
- *make it unnecessary for you to consult a lawyer;*
- *make choices for you: the mediator helps you and your spouse reach choices for yourselves, keeping in mind your own needs and the needs of your children.*

THE ROLE OF YOUR LAWYER

It is essential that you have your own lawyer during mediation. A lawyer can tell you about your rights and responsibilities under the law, can give you legal advice, and can look at your agreement before you sign it to make sure that it is legally sound and does what you want it to do. In some parts of the country lawyers draft the mediation agreement with information provided by the mediator.

Even if your mediator is a lawyer, both you and your spouse still require your own lawyers. While a mediator can provide some basic legal information, only your own lawyer can give you independent legal advice that applies to your own situation.

If you have children, particular attention will be given to questions concerning their care. How will you share the cost of bringing up the children? Who will get custody of them? What arrangements need to be made so that they can spend time with the other spouse? What special arrangements need to be made to meet your child's individual needs?

The mediator may ask you to do some "homework" too. You may need to get financial information about the cost of renting an apartment or about buying replacement furniture or about insurance. You may need to outline the day-to-day needs of your children, or to prepare a list of family assets. If necessary, the mediator may ask you to get advice from another professional, such as an accountant or a tax expert. In mediation, you should be prepared to discuss financial matters openly.

Looking at Options

As issues are defined, you can begin to look at different ways of solving each problem. For example, you and your spouse may not agree about support payments. With the help of the mediator you may find a way to resolve your differences that you had not thought of before.

Making Choices

Having looked at your options, you and your spouse can negotiate on the different issues and make joint decisions on how you will settle them. This stage in mediation, perhaps more than any other, requires your willingness to give and take a little to find solutions.

Putting Solutions in Writing

Once you and your spouse have made your decisions, the mediator helps you to put them down on paper. Your lawyer may help with this, too. This draft agreement will contain specific,

detailed information on how you have agreed to settle each problem. For example, the draft agreement might say with whom your children will live and when they will stay with the other spouse.

Legal Advice

Before finalizing an agreement, both you and your spouse should have it reviewed by your own lawyers. Each lawyer will check the agreement to make sure that your legal rights have been protected, that the agreement says what you want it to say, and that it is legally sound. If the lawyer finds that something is missing or is unclear, mediation can continue, or your lawyer can negotiate with your spouse's lawyer to revise the agreement.

Signing the Agreement and Going to Court

After you and your spouse have reviewed the agreement with your own lawyers, and you are satisfied that it sets out your decisions accurately, you will both sign it. When you sign the agreement, you are agreeing to everything it says. It is a legal document.

At the time your divorce is before the court, the court will look over the agreement. Courts usually will not change an agreement unless one spouse challenges it, it contains legal mistakes, or it does not provide adequately for your children. If everything is in order, the court will make your agreement part of its decision on your divorce. Those parts of your agreement over which the court has authority become an order of the court.

In your province or territory, you may not have to go to court in person if you have an agreement and your divorce is uncontested. The court will look at your agreement and your request for a divorce, and if everything is all right can give you a divorce without holding a trial.

MEDIATION IS VOLUNTARY

Mediation can only begin if you and your spouse agree to it, and it can only continue if you want it to. If at any time you feel that mediation is not working, you are free to stop it.

Sometimes in a contested divorce, if you have not yet tried mediation, the judge may suggest that you and your spouse see a mediator before coming back to court.

CONFIDENTIALITY

The conversations you and your spouse have with a mediator are private. As a matter of professional ethics, mediators will not discuss the details of these conversations with anyone else.

Is Mediation a Good Idea for Us?

"It was my wife's lawyer who suggested mediation. She thought we should try to work things out for ourselves. When my lawyer passed on the idea to me, I wasn't sure. In theory mediation seemed fine, but I was worried that I wouldn't be able to say what I wanted."

Mediation can be a good way to reach a workable divorce agreement for many couples. However, it is not the answer for everyone.

- Where there has been violence during your marriage, mediation may or may not work. If fear of violence prevents you from discussing your needs openly and freely, mediation is not advisable.
- If there has been child abuse in your family, mediation probably cannot go ahead. A person who finds out about child abuse is supposed to tell the child protection authorities and the police about the abuse. Mediation may have to stop when the mediator reports the child abuse.
- Mediation is not worthwhile if either you or your spouse is not motivated enough to make it work.

In other situations mediation *can* work. But remember, it is not a cure-all or an easy way out. It takes time and effort to work things out with your spouse, and you must be willing to agree on solutions.

MEDIATION AFTER A DIVORCE

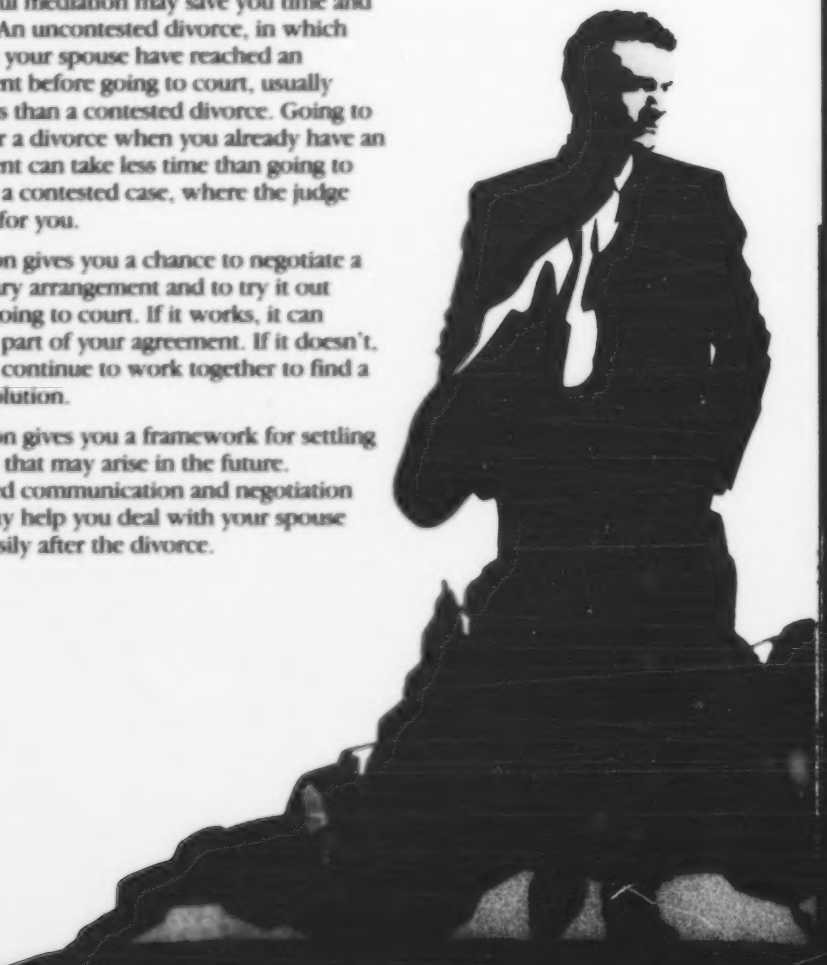
Mediation is also an option for people who are already divorced. Circumstances often change after an agreement has been signed – children grow older, people move, someone loses a job, relationships change. Sometimes custody and access arrangements just don't work out.

If you and your ex-spouse are no longer happy with the terms of your separation or divorce, a mediator can help you to negotiate a new arrangement. Once you have had it reviewed by your lawyer and have signed a new agreement, you can go back to court to have the original court order changed and your new agreement approved.

Support and custody arrangements can be changed in this way. However, property arrangements cannot be changed after a divorce is final.

The Advantages of Mediation

- A mediated agreement is *your* agreement, one that you have worked out together. You may both find it easier to accept and respect.
- A mediated agreement can take into account your family's special needs.
- With mediation you may avoid some of the tension and conflict that arise if you have to go to court as adversaries and have a judge decide the terms of your divorce for you.
- Successful mediation may save you time and money. An uncontested divorce, in which you and your spouse have reached an agreement before going to court, usually costs less than a contested divorce. Going to court for a divorce when you already have an agreement can take less time than going to court in a contested case, where the judge decides for you.
- Mediation gives you a chance to negotiate a temporary arrangement and to try it out before going to court. If it works, it can become part of your agreement. If it doesn't, you can continue to work together to find a better solution.
- Mediation gives you a framework for settling disputes that may arise in the future. Improved communication and negotiation skills may help you deal with your spouse more easily after the divorce.



Feelings

"I didn't think we could be in the same room together for over five minutes. When we split up, we couldn't speak to each other without being mean or sarcastic. My stomach hurt. We were enemies."

Few things in life are as emotionally difficult as divorce or separation, especially when children are involved. When you are so upset, it may be difficult to imagine how mediation can work.

But it *can* work, despite the painful feelings that are natural during divorce. In fact, if you did not have these feelings, mediation would probably not be necessary. If you were able to talk calmly with your spouse, you would likely be able to settle your problems without the help of a mediator.

The mediator's task is to make mediation work even though feelings on both sides may be strong. For mediation to work, you and your spouse do not have to deny the strong feelings causing you to want to separate or divorce. However, you do have to be willing to look for solutions together, to compromise and co-operate despite your strong feelings.

Mediation is not therapy. You and your spouse must be prepared to look beyond your personal hurts to the future needs of all members of the family.

Children

"We just saw things so differently. The kids would cry when I'd come to pick them up. I thought she was turning them against me, making them angry with me. She thought they didn't want to see me. We were both wrong."

Children feel threatened, hurt and confused when their parents' marriage breaks down. Whatever their parents are going through with each other, children need a sense of security and the opportunity to love and be loved by both parents.

If you have children, mediation can help to reduce their distress and insecurity during your divorce. By explaining mediation to your children and keeping them informed of any progress, you can reassure them that you and your spouse are trying to work something out with them in mind. They may feel more secure because they sense that their parents are still in control and making decisions together about the future.

Agreements reached through mediation can take into account the personal needs of children in much more detail than other kinds of agreements. Does your daughter need a drive to her skating lessons each Saturday? Who will take her to the lessons after the divorce? Does your son spend a week at a friend's cottage each summer? How will that be arranged after the divorce? In mediation you and your spouse can make specific arrangements for your children's future a part of your agreement. Mediated agreements can leave fewer unsolved problems that could affect the well-being of your children.

Some mediators may want to talk to your children during mediation. This way your children have the opportunity to say what they want. They can express feelings that may have been overlooked and that can be considered when arrangements are being made.

When mediation is successful, it is because it focuses on plans for the future of the children, not on their parents' conflicts and grievances.

Finding a Mediator

"We figured that settling about the house would be the hardest issue. I couldn't bear the thought of leaving the house, but I didn't have the money to pay my husband for half of it. He wanted to get his money out so he could find a new place. The problem seemed impossible. It wasn't."

There are three different kinds of mediation services:

- Mediation provided through family courts or the courts that hear divorce cases in your province or territory;
- Mediation provided by social service agencies and community organizations;
- Mediation provided by professionals – usually social workers, psychologists, lawyers and, in Quebec, notaries – working as mediators in private practice.

If you are participating in court-based mediation, then you will be working with a mediator assigned to you. If you are using one of the other kinds of services, then you may have to find a mediator on your own.

There are several ways to find a mediator. In many communities, mediators are listed in the Yellow Pages. Lawyers and therapists can often recommend mediators, as can people who have already used mediation. There is a national association of mediators called Family Mediation Canada and provincial mediation associations exist in several provinces. They may be able to provide you with names of mediators working in your community.

LOOKING IN THE YELLOW PAGES

Mediators are not listed in the Yellow Pages in the same way throughout the country. If you are using the telephone book to find a mediator you might try looking under the following headings:

Mediation
Divorce Mediation
Family Mediation
Arbitration/Mediation
Marriage and Family Counselling
Social Workers
Psychologists
The Law Society
Lawyers
Notaries

WHAT DOES MEDIATION COST? WHO PAYS FOR IT?

The cost of mediation depends on the kind of service that you use.

- *If available, court-based mediation services are usually free.*
- *You may or may not have to pay for mediation offered by social agencies. When there is a fee, it is usually based on your ability to pay.*
- *Private mediators charge by the hour and have a very wide range of fees. The cost of mediation will depend on the length of meetings and the number of meetings it takes to reach an agreement. You can expect to pay between $50 and $150 per hour and to go to four to eight meetings.*
- *Unless you agree otherwise, the cost of mediation will usually be split by you and your spouse according to your ability to pay.*

It is important when you are looking for a mediator to find one who works on the kinds of problems that you are trying to solve. Some mediators and mediation services handle only questions of child custody and access; others deal with both child-related and financial problems.

There are currently no regulations governing who can become a mediator. Mediators come from various professional backgrounds and work in different ways. Many have training in social work, law or psychology.

Before you go into mediation, it may be helpful to talk to a few mediators to find one with whom you think you'll be able to work well. Here are some of the things you might want to be aware of when speaking with prospective mediators.

- What kinds of problems do they mediate? Just custody and access, or do they mediate financial problems too?
- How do they feel about different kinds of arrangements? For instance, how do they feel about divorced parents sharing custody of the children in a joint custody arrangement?
- What is their training and experience? Are they lawyers, therapists, social workers, psychologists, psychiatrists, notaries? What kind of mediation training have they had? How long have they been mediating?
- How many meetings do they usually hold? Will they want to meet with you and your spouse separately? Do they involve children in mediation?
- What about their fees? How and when is payment expected?

Making Mediation Work for You

"In the end it took us about eight weeks to get through mediation. Most of the things we wanted to settle we did. That was great. But the benefits of mediation didn't end when the meetings did. Just because you've gotten divorced doesn't mean you're never going to have to speak to each other again. Situations change, kids grow up, and there are always new problems to solve."

If you have decided that mediation could work for you, here are some ways to prepare yourself for the first meeting.

1. Get legal advice on your rights and responsibilities. Ask if your lawyer has worked with mediators and has any recommendations.

2. Think about what issues are most important for you and for your children and what should be discussed in mediation.
3. Gather information on what you might be discussing in mediation. Make lists of your income, your debts, your financial responsibilities, your personal expenses, and your family assets. Think of practical matters that need to be sorted out. This will all be useful information during mediation.
4. Think about the needs of your children that are different from yours. For example, while you may need to separate from your spouse, your children will probably need an ongoing relationship with both of you.
5. Be prepared to listen and to compromise. Be ready to accept other ways of reaching your goals.

During mediation:

1. Don't feel pressured to rush into an agreement or to commit yourself to an agreement until you are certain that you can live with it. You may want to try living with an agreement for a while before making it final.
2. Talk to other professionals, like social workers, bank managers, accountants or insurance agents, if you feel you need more information on some particular point being discussed.
3. Have your agreement reviewed by your lawyer before you sign it.

If, after reading this booklet, you think mediation could work for you, you may want to suggest mediation to your spouse. Mediation may be right for both of you.

Further Reading

The Department of Justice has published additional booklets on the divorce law:

DIVORCE LAW: QUESTIONS AND ANSWERS,
DIVORCE LAW FOR COUNSELLORS and
AN INVENTORY OF DIVORCE MEDIATION AND RECONCILIATION SERVICES IN CANADA

To obtain a free copy of these publications, please contact the Communications and Public Affairs Directorate.